

## MAYERSON & ASSOCIATES

330 WEST 38TH STREET, SUITE 600 • NEW YORK, NEW YORK 10018  
PHONE (212) 265-7200 • FAX (212) 265-1735 • EMAIL: ADMIN@MAYERSLAW.COM

WWW.MAYERSLAW.COM

July 31, 2009

**VIA ECF, EMAIL AND REGULAR MAIL**

Hon. Richard J. Sullivan, U.S.D.J.  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

**RE: J.N., by his parents, H.N. and M.N. v. New York City Department of  
Education Docket No. 09-cv-00020**

Dear Judge Sullivan,

We represent the plaintiffs-appellants in this IDEIA based appeal. We are writing to respond to the new arguments raised in Defendant's July 23, 2009 Reply Memorandum of Law.

Defendants claim that Exhibits H and I should be excluded as untimely, unauthenticated, and irrelevant. In fact, just the opposite is true. We respectfully submit to Your Honor the July 17, 2009 transcript of sworn testimony from Julie Fisher, Director of the Charter School, expressly authenticating Exhibit H. We ask that Your Honor consider these "authenticating" transcript pages as part of our submission to this Court.

Exhibit H, a document that is properly an "additional evidence" document that was not previously disclosed to us, is a relevant document establishing that the NYCDOE's position that students at the Charter School do not "need" any related services because of an "embedded" classroom "model" at the Charter School is simply not true. This documentation shows, for roughly 80% of the students, that defendant has been providing quite *intensive* levels of "related services" outside of the Charter School through "Related Service Authorizations," and that this "shadow" system of service delivery is the actual "model" that defendant and the Charter School have been following in practice.

We received this document only in the context of J.N.'s 2008-2009 impartial hearing and were unable to submit them as part of plaintiffs' earlier filings. Moreover, under Rule 26, defendant should have voluntarily disclosed such documents to us as they are highly relevant to the core issues on appeal.

Defendant next argues that a Burlington/Carter analysis does not apply because the Charter School is a “public school” placement and not a unilateral private school placement chosen by plaintiffs. Defendant also asserts that a pendency placement is not entitled to a Burlington/Carter analysis. These arguments must fail.

First, the Charter School is an approved school, but it is not a typical NYCDOE public school placement. Students, like J.N., must “win the lottery” in order to secure a placement at the Charter School; this is unlike any other public NYCDOE placement. Second, it is plaintiffs’ position on this appeal that for J.N., the Charter School placement was an appropriate *component* of a FAPE, but that continuation of J.N.’s related services, etc. was needed to provide a FAPE. J.N. is entitled to a Burlington/Carter analysis for all related services secured by his parents which were and continue to be “reasonably calculated” for J.N. to make “meaningful progress.”

20 U.S.C. § 1415 (i) gives this Court broad discretionary powers and states:

The Court...basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415 (i) (C) (iii).

Plaintiffs maintain that J.N.’s pendency entitlements of SEIT and other related services, coupled with the Charter School, offered J.N. a “reasonably calculated” educational program. We are simply asking this Court, pursuant to 20 U.S.C. § 1415(i), to exercise its power to issue appropriate declaratory relief.

Respectfully,

Gary S. Mayerson

cc: Janice Casey Silverberg, Esq.  
Janice Birnbaum, Esq.  
Assistant Corporation Counsel  
New York City Law Department  
100 Church Street - Room 2-182  
New York, NY 10007

H.N. and M.N. (J.N.’s parents)

DEPARTMENT OF EDUCATION  
Of the  
CITY OF NEW YORK

In the Matter of:

JONATHAN NEWHOUSE

Case No.: 120294

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District #2  
131 Livingston St.  
Brooklyn, NY 11201

Friday  
July 17, 2009

The above-entitled matter came on for hearing  
at 10:00 a.m.

BEFORE: NANCY LEDERMAN,  
Impartial Hearing Officer

A P P E A R A N C E S:

For the Student:

GARY MAYERSON, Attorney  
NAOMI BERGER, Intern  
HOWARD NEWHOUSE, Parent  
MICHELLE NEWHOUSE, Parent  
MARJORIE RAPPAPORT, Speech Provider (Via Telephone)  
RIKA KANAZAWA, Head Teacher, NYCA (Via Telephone)  
JULIE FISHER, Director, NYCA (Via Telephone)  
GAIL MERYFIELD, Speech Pathologist (Via Telephone)

For the Department of Education:

JOSHUA FEUER, Attorney  
JACQUELINE DEVORE, Attorney

I N D E X

WITNESS	DIRECT	CROSS	RE DIRECT	CROSS	RE	V.	IHO
M. Rappaport	432	497	518	535			
R. Kanazawa	545	558	581	590			595
J. Fisher	611	623	630				
G. Meryfield	645	665	688				

E X H I B I T S

PARENT	DESCRIPTION	I.D.	IN EV.
S	New York City Charter School Related Services Delivered As Of 12/17/08, 2 pgs.	622	623
V	Curriculum Vitae for Gail Meryfield, 5 pgs.	648	648

DEPARTMENT OF EDUCATION	DESCRIPTION	I.D.	IN EV.
14	IEP dated 3/26/09, 47 pgs.	633	633

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610

611

1 if--  
2 (OFF THE RECORD)  
3 (ON THE RECORD)  
4 HEARING OFFICER LEDERMAN: Okay. Let's  
5 go back on the record. All right. Mr. Mayerson,  
6 you're calling the witness?  
7 MR. MAYERSON: Yes.  
8 MR. FEUER: Recalling.  
9 MR. MAYERSON: Recalling Julie Fisher.  
10 HEARING OFFICER LEDERMAN: Okay. Ms.  
11 Fisher, hi.  
12 MS. JULIE FISHER: Hi.  
13 HEARING OFFICER LEDERMAN: How are you  
14 doing?  
15 MS. FISHER: Good. How are you?  
16 HEARING OFFICER LEDERMAN: Okay. You  
17 are still under oath.  
18 MS. FISHER: Okay.  
19 HEARING OFFICER LEDERMAN: So I'm not  
20 going to give you all the instructions again.  
21 I'm sure you remember them or you'll pick them up  
22 if we need them.  
23 MS. FISHER: Yes.  
24 HEARING OFFICER LEDERMAN: And I'm just  
25 going to let Mr. Mayerson ask you the questions

1 that he has. And then Mr. Feuer may ask you some  
2 questions after.  
3 MS. FISHER: Okay.  
4 MR. FEUER: And just briefly for the  
5 record, although, obviously, the reference to the  
6 document is over my objection, and the recalling  
7 of the witness is also over my objection, just  
8 for the record.  
9 HEARING OFFICER LEDERMAN: Oh, is that  
10 right? I didn't know that.  
11 MR. FEUER: Well, no, I had, well, I  
12 discussed, first of all, calling of the witnesses  
13 we called today via subpoena for cumulative. And  
14 I think you're generally only entitled to only  
15 one bite of the apple. And so I'm sorry, I  
16 thought it was discussed at some point. But if  
17 not--  
18 HEARING OFFICER LEDERMAN: (Interposing)  
19 Okay.  
20 MR. FEUER: --please note my objection.  
21 HEARING OFFICER LEDERMAN: Okay. Noted.  
22 Go on, Mr. Mayerson.  
23 MR. MAYERSON: Thank you. Ms. Fisher,  
24 we'll try to just stay focused on this one.  
25



612

1 do you have any documents in front of you?

2 MS. FISHER: I believe, I have the  
3 related service delivery chart that--

4 HEARING OFFICER LEDERMAN: (Interposing)  
5 Okay. Could you read to me the title at the top  
6 of the page of that?

7 MS. FISHER: It says, NYCA Charter  
8 School Related Services Delivered As Of 12/17/08.

9 HEARING OFFICER LEDERMAN: That's it,  
10 okay. Go on, Mr. Mayerson.

11 MR. MAYERSON: Okay. My first question  
12 is, is this document or spreadsheet or whatever  
13 you want to call it, is this something that comes  
14 from the files and records of the New York City  
15 Charter School?

16 MS. FISHER: From our school, yes.

17 MR. MAYERSON: Okay. And do you know  
18 who prepared this document?

19 MS. FISHER: Yes.

20 MR. MAYERSON: Who did?

21 MS. FISHER: Susan Michaelson

22 (phonetic), who is our quality assurance manager.

23 MR. MAYERSON: Okay. And do you know

24 what documents, if any, Ms. Michaelson used in

25 order to prepare this document?

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613

MS. FISHER: Individualized Education  
Plans for each of the students.

MR. MAYERSON: Okay. And since this  
time, has the Charter School continued to

maintain records of this type to track the RSAs  
issued per IEP, and what related services

students at your school are receiving after  
school through the DOE?

MS. FISHER: Yes.

MR. MAYERSON: Okay. At any time during  
the 2008-2009 school year, at any time, did you--  
was there ever an instance where you needed--you  
felt compelled to turn to Marjorie Rappaport to  
discuss any specific speech and language issues  
that Jonathan Newhouse had?

MR. FEUER: Objection. Beyond the scope  
of--well, first of all, he offered what he was  
going to be calling her for.

HEARING OFFICER LEDERMAN: Yes. Mr.

Mayerson, we were calling--

MR. MAYERSON: (Interposing) Okay.

HEARING OFFICER LEDERMAN: We had  
recalled this witness, and I had allowed it, just  
for purposes of this chart--

MR. MAYERSON: I'm sorry. Let me  
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614

1 withdraw the question.

2 HEARING OFFICER LEDERMAN: If you have  
3 questions concerning this chart, I might allow  
4 those over Mr. Feuer's objection. But let's--but  
5 not questions outside--

6 MR. MAYERSON: (Interposing) All right.

7 Do you know--

8 HEARING OFFICER LEDERMAN: --the four  
9 corners of these pages.

10 MR. MAYERSON: Okay. On Page 2 of the  
11 document in question, which is Exhibit S in our  
12 binder, and I'm not sure if yours has an S or  
13 not, but there's a notation under Jonathan  
14 Newhouse's name; no services recommended,  
15 appealing IHO decision. Who, if anyone, gave the  
16 writer of this, the information that there was a  
17 litigation or that there was an appeal of an IHO  
18 decision, to be able to put on this document?

19 MS. FISHER: I have no idea.

20 MR. MAYERSON: Okay. Is Ms. Michaelson  
21 still employed by the Charter School?

22 MS. FISHER: She is.

23 MR. MAYERSON: Okay. May I just put the  
24 witness on mute? Because I want to ask a

25 question, and I don't want to say it until --

1 clear it with the Hearing Officer--

2 HEARING OFFICER LEDERMAN: (Interposing)  
3 Okay. Ms. Fisher, we're going to put you  
4 on hold for a moment.

5 MS. FISHER: Okay.

6 HEARING OFFICER LEDERMAN: Okay. Is she  
7 on hold? No? Yes?

8 MR. MAYERSON: I'll just do that, it's  
9 easier. Hello, Julie, can you hear me? No, she  
10 can't. I wanted to ask this witness, and subject  
11 to your ruling, whether or not the whole system  
12 of related services is changing at the Charter  
13 School as of September to make provision for  
14 those related services to be delivered at the  
15 Charter School starting in September. That would  
16 be my question.

17 HEARING OFFICER LEDERMAN: All right.

18 Let me--are you going to object to that?

19 MR. FEUER: Yeah. Well, and you  
20 sustained the objection previously when Mr.  
21 Mayerson asked the same question. And so I would  
22 object for the same reasons.

23 HEARING OFFICER LEDERMAN: Okay. And  
24 you can argue it to me a little more, but I'm

25 going to sustain the objection.

THIS CASE WAS FILED FOR THE RECORD IN THE  
CLERK'S OFFICE OF THE COURT OF APPEALS FOR THE  
SECOND CIRCUIT, NEW YORK, ON JULY 31, 2009.  
CLERK: JESSICA L. HARRIS